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ALEXANDER L. STEVAS,
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NO. 83-153

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

Gordon H. Faulkner,
Jack Duckworth,
Ronald Preake,
Dr. John Strefling,
Dr. Rodger Saylors,
Dr. D. R. Reed,
Dr. R. J. Houck, and
Dr. Nghia Mai,

Petitioners,

v.

Billy Merritt,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

I.

Nature Of The Case

Plaintiff's civil rights action (under 42 U.S.C. §1983) alleged that he was subjected to cruel and unusual punishment in violation of his Eighth and Fourteenth Amendment rights because of defendants' deliberate indifference to a serious medical problem (i.e., blindness) which arose while he was in prison.

After a bench trial before the United States District Court for the Northern District of Indiana, judgment was granted in favor of defendants. This judgment was reversed by the Seventh Circuit Court of Appeals, which held that the trial judge had abused his discretion in denying plaintiff's motions for appointment of counsel and for a jury trial. The defendants have filed a petition for a writ of certiorari.

II.

Facts Material To Consideration Of The Questions Presented

A. Substantive Facts

For some time prior to July 1978, and continuously through his trial, plaintiff was a prisoner at the Indiana State Prison at Michigan City, Indiana ("the prison"). (See Tr.Pr., 36)*/ At the time of the events alleged in the

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*/ Record citations are made in two forms in this Reponse. Citations to the transcript of proceedings include the page number of the transcript and are in the form "Tr.Pr.,____". Other citations are descriptions of documents filed in the district court. Included for each such citation is the number found in the lower right hand corner of the document contained in the record certified by the district court. These citations are in the form "Doc. #____". Where applicable, citations to documents in petitioner's Appendix are included in the form "App.____".

complaint, defendants Roger Saylors and Nghia Mai were physicians on the staff of the prison (Tr.Pr., 111, 129); defendant O. D. Reed was a consulting optometrist at the prison (Tr.Pr., 20); defendant R. J. Houck was a consulting ophthalmologist at the prison (Tr.Pr., 10); defendant Ronald Freake was the administrator of medical services at the prison (Tr.Pr., 100); defendant John Strefling was an assistant administrator of medical services at the prison hospital (Pl.Trial Br.; Doc. #36 at 1); defendant Jack Duckworth was the warden of the prison (Pl. Trial Br.; Doc. #36 at 1); defendant Gordon Faulkner was the Commissioner of the Indiana Department of Corrections. (Pl. Trial Br.; Doc. #36 at 1)

On July 10, 1978, plaintiff's left eye was injured at the prison. (Tr.Pr., 36-37) Shortly thereafter, he began to complain of blurred vision. (Verified Resp.; Doc. #37) On July 12, 1978, two days after the accident, plaintiff was examined by Dr. Saylors. (Tr.Pr., 37) At the time of the examination, Dr. Saylors was not able to determine whether the plaintiff had suffered any damage to his left eye, and he made a referral to the prison optometrist, O. D. Reed. (Tr.Pr., 117) Dr. Saylors testified that plaintiff's complaint was "serious enough to act on it promptly". (Tr.Pr., 118-119) He noted in plaintiff's medical file, "Refer to Dr. Houck, urgent". (Tr.Pr., 112)

On July 13, 1978, Dr. Houck examined plaintiff and found that he had a vitreous hemorrhage in the left eye. (Verified Resp.; Doc. #37) However, although he re-examined plaintiff, Dr. Houck did not prescribe any treatment for the injured eye during the next five and one-half months (Tr.Pr. 48-49), Dr. Saylors testified that it was unusual to wait five and one-half months to begin treatment on an injury such as the one plaintiff had suffered. (Tr. at 117-118)

In August, 1978, Dr. Houck arranged for plaintiff to be tested for sickle cell disease. (Verified Resp.; Doc. #37) The results of that test were purportedly positive. (Verified Resp.; Doc. #37) Dr. Houck believed that there might have been a relationship between the presence of sickle cell disease and the hemorrhaging in the plaintiff's left eye, but he knew nothing about treating sickle cell disease. (Tr.Pr., 64) Dr. Houck neither treated plaintiff nor referred the plaintiff to another physician in August when he received the results of the sickle cell tests.

On December 12, 1978, five months after plaintiff's injury, Dr. Houck recommended that plaintiff be referred to a consulting surgeon for consideration of a vitrectomy on the injured eye. (Tr.Pr., 75) This surgery would have removed fluid from plaintiff's left eye. (Tr.Pr., 77) On January 29, 1979, more than six months after his injury, plaintiff was finally released to Wishard Memorial Hospital in Indianapolis for treatment of his eye. (Verified Resp.; Doc. #37)

At Wishard Hospital the attending surgeons did not perform a vitrectomy on plaintiff's injured eye. (Tr.Pr., 60) Instead, argon laser photocoagulation was performed on the plaintiff's right eye (Tr.Pr., 60), even though plaintiff's vision in his right eye was measured to be 20/25 and he had never complained about that eye. (Tr.Pr. 67-68; Verified Resp.; Doc. #37) Following the treatment at Wishard Hospital, plaintiff's vision in his right eye deteriorated, and plaintiff became functionally blind in both eyes. (Tr.Pr., 41)

In September 1979, plaintiff was examined by Dr. Nghia Mai. (Tr.Pr., 130) In the course of the examination, Dr. Mai noted that there was still hemorrhaging in plaintiff's left eye. (Tr.Pr., 130) Dr. Mai referred plaintiff to Dr. Strefling for consideration for further treatment, including further surgery. (Tr.Pr., 131-132) No other operative

treatment was ever performed on plaintiff's eyes. (Verified Resp.; Doc. #37)

B. Procedural History

1. The Pleadings

On July 7, 1980, plaintiff filed his Complaint setting forth the history of his medical problems; the lack of treatment; the interference with plaintiff's medical care caused by defendants Duckworth, Freake and Strefling; the intentional misfeasance by defendant Faulkner; and the injury suffered by plaintiff. Plaintiff sought declaratory and injunctive relief and compensatory and punitive damages. In his prayer for relief, plaintiff sought leave to proceed in forma pauperis pursuant to 28 U.S.C. §1915. (Complaint; Doc. #3)

On July 7, 1980, the trial court found that plaintiff was unable to prepay the fees and costs of commencing his action and granted plaintiff leave to proceed in forma pauperis. (Order; Doc. #1)

On August 6, 1980, defendants filed their answer, generally denying plaintiff's substantive allegations, and raising as affirmative defenses the allegations that defendants acted in good faith and that plaintiff's ocular problems were caused by sickle cell anemia. (Answer; Doc. #4)

2. Motion For Appointment Of Counsel

On August 13, 1981, plaintiff moved for the appointment of counsel. (Motion For Appt. Of Counsel; Doc. #5) As of October 30, 1980, the court had not ruled on plaintiff's motion for appointed counsel, and plaintiff moved for appointment of two prison inmates as lay assistants. (Motion For Appt. Of Assoc. Counsel; Doc. #15) The motion expressly stated that the lay assistants "will not take the place of

Appointed Counsel". On November 3, 1980, the court granted plaintiff's motion for the appointment of lay assistants. (Order; Doc. #19)

On December 15, 1981, fifteen days before trial, plaintiff's motion for the appointment of counsel was denied. (Order; Doc. #31) As a result of this order, plaintiff proceeded to trial without the assistance of counsel.

3. Motion For Jury Trial

On August 26, 1980, 19 days after defendants' Answer had been filed, plaintiff made a demand for a jury trial pursuant to Fed. R. Civ. P.38(d). (Demand For Jury; Doc. #7) On October 1, 1980, this demand was stricken as untimely under Fed. R. Civ. P. 38(b). (Order; Doc. #8) On October 14, 1981, plaintiff moved, under Fed. R. Civ. P. 38, for reconsideration of the order striking the jury demand. (Motion To Reconsider; Doc. #9) In support of the motion, plaintiff set forth that he was blind, that he had not had professional assistance in presenting motions before the court, and, therefore, that his failure to make a timely jury demand was excusable. On October 15, 1980, plaintiff's motion for reconsideration was denied, and plaintiff was denied a jury trial. (Order; Doc. #14)

4. Motion For Examination By Independent Physician

On September 10, 1980, plaintiff moved for an order allowing him to be examined by a court-appointed physician. (Motion For Med. Ex.; Doc. #13) In support of his motion, plaintiff set forth that an examination by an independent physician was necessary to allow him to present an "evaluation and objective evidence of [his] injury". As of December 15, 1980, the court had not ruled on this Motion, and plaintiff again brought the matter to the attention of the court in his Motion for Continuance. (Motion For Cont.; Doc. #26) An

examination of the record on appeal discloses that the trial court never ruled on plaintiff's motion for an examination by an independent physician.

5. The Trial

On December 30, 1980, a trial was held. Plaintiff introduced evidence through nine witnesses. The only physicians called by plaintiff were three of the defendants, Dr. Houck, Dr. Saylors, and Dr. Mai.

Plaintiff unsuccessfully sought to have trial subpoenas served on five physicians who had treated plaintiff at Wishard Hospital. (Tr.Pr., 4) None of these physicians was a defendant in the case. None of them appeared at trial, and the court stated that Indianapolis was beyond his subpoena powers. (Tr.Pr., 74)

At the close of trial, the court entered judgment in favor of defendants. The court found that plaintiff had failed to prove that defendants were deliberately indifferent to plaintiff's medical problems. (Tr.Pr. 146)

6. The Appeal

On January 27, 1981, plaintiff filed his Notice of Appeal (Notice of App.; Doc. #41) and his motion to proceed in forma pauperis. (Motion; Doc. #43) The court of appeals granted plaintiff's motion to proceed in forma pauperis and appointed counsel for plaintiff.

On January 6, 1983, the court of appeals reversed the judgment in favor of defendants, holding that the district court abused its discretion when it denied plaintiff's request for appointed counsel and when it denied plaintiff's request for a jury trial. (App. 9, 14.)

REASONS FOR DENYING THE WRIT

Petitioners contend that certiorari should be granted on the grounds that the decision of the Seventh Circuit is in conflict with decisions of other circuits, with a decision of this Court and with the Federal Rules of Civil Procedure. Petitioners' contentions are without merit and misstate the opinion of the Seventh Circuit.

I.

The Seventh Circuit Did Not Hold That Counsel Must Be Routinely Appointed In Prisoners' Civil Rights Litigation; Its Decision Is Not In Conflict With Decisions Of Other Circuits.

Petitioner argues that "[t]he Seventh Circuit has determined that the appointment of counsel should be nearly a routine matter in civil rights actions brought by indigent prisoners." (Pet'n. at 5) This statement is patently false.

The Seventh Circuit held that, while the appointment of counsel pursuant to 28 U.S.C. §1915(d) rests in the discretion of the trial court, such discretion has to be exercised within certain standards. The court set forth five nonexclusive factors which a trial court should consider in ruling upon a request for appointment of counsel. Those factors were (1) whether the merits of the indigent's claim are colorable; (2) the ability of the indigent plaintiff to investigate crucial facts; (3) whether the nature of the evidence indicates that the truth will more likely be exposed where both sides are represented by counsel; (4) the capability of the indigent litigant to present the case; and (5) the complexity of the legal issues raised by the complaint. (App.8) The court's application of these factors showed that the appointment of counsel in this case was required because this is an exceptional case.

First, the fundamental factual question of the cause of plaintiff's blindness was an unusually complex one. Even defendants waffled on this issue, first claiming that the blindness was caused by sickle cell anemia and then claiming that they did not know the cause.*/

Second, the very condition which is the subject of the lawsuit, plaintiff's blindness, obviously prevented plaintiff from preparing his own case.

Third, the appointment of lay assistants was not enough to permit plaintiff to present his case properly. As the court of appeals noted, the trial transcript revealed "how well meaning but, nevertheless, incompetent the lay assistants were". (App. 10) Those assistants were simply incapable of dealing with the complexities of plaintiff's case, and the trial court had been so advised in plaintiff's motion for appointment of lay assistants. Finally, the only physicians other than defendants who had examined plaintiff after his injury were, at the time of trial, beyond the subpoena power of the court. Thus, plaintiff was forced to go to trial without access to an independent physician to examine him and to testify. He was also forced to go to trial without an attorney who could have secured pertinent testimony by deposition from the only non-defendant physicians who had examined plaintiff.

The above unusual circumstances were elements weighed by the court of appeals in determining that plaintiff was entitled to the appointment of counsel. There is nothing in the opinion of the Seventh Circuit which suggests that appointment

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*/ The record does show, though, that plaintiff's treating ophthalmologist knew he had no experience in treating sickle cell-related diseases and yet made no referral for more than five months after he suspected a connection between sickle cell anemia and plaintiff's ocular problems. Another physician testified that the delay in providing treatment to plaintiff was "unusual".

of counsel must be made "routinely". Petitioners simply misstate the record when they argue that "[t]here are no . . . exceptional circumstances identified in the Seventh Circuit's opinion" justifying the appointment of counsel. (See Pet'n. at 6)

By misstating the holding of the Seventh Circuit, petitioners have also erroneously concluded that there is a conflict between the Seventh Circuit's decision and the decisions of other circuits. In the Ninth Circuit case, United States v. McQuade, 647 F.2d 938 (9th Cir. 1981), defendants refused to provide a reasonable statement of indigency and argued that they had an absolute constitutional right to the appointment of counsel, regardless of their financial position. It was in that context that the Fourth Circuit held that counsel may be appointed under 28 U.S.C. §1915 only in exceptional circumstances. Thus, the decisions of the Fourth and Seventh Circuits are in harmony. In the Fourth Circuit case, Cook v. Bounds, 518 F.2d 779 (4th Cir. 1975), there was simply no showing, as there was in the case sub judice, of any exceptional circumstances. Again, there is no conflict among the circuits, and petitioner's assertions to the contrary provide no basis for granting certiorari.

II.

The Seventh Circuit Did Not Hold That An Inadvertent Failure To Provide Medical Care May Give Rise To An Eighth Amendment Claim; Its Decision Is Not In Conflict With This Court's Decision In Estelle v. Gamble.

Petitioners make a frivolous contention when they argue that the Seventh Circuit decision allows an Eighth Amendment claim upon proof of an inadvertent failure to provide adequate medical care. Petitioners' argument is a blatant mischaracterization of the Seventh Circuit's opinion.

The Seventh Circuit did note that one of the chief issues raised by plaintiff's claim could be phrased in several ways. These were:

> (1) whether the defendants acted with deliberate indifference to Merritt's serious medical needs, (2) whether defendants' conduct was an inadvertent failure to provide adequate medical care or a "wanton infliction of unnecessary pain," or (3) whether defendants acted in conscious disregard of Merritt's medical needs. Estelle v. Gamble, 429 U.S.97, 105-106 (1976) [other citations omitted]

(App. 9)

Petitioners seize upon the Seventh Circuit's second phrasing of the issue and argue that the Seventh Circuit ignored the clear holding of Estelle v. Gamble, 429 U.S.97, 105-106 (1976), which the Seventh Circuit itself cited.

A reading of the entire sentence of the Seventh Circuit's opinion shows that the two standards stated in the second clause (i.e., "inadvertent failure to provide adequate medical care" and "wanton infliction of unnecessary pain") were used in the exclusive, and not inclusive, disjunctive. That is, the Seventh Circuit simply noted that plaintiff could succeed in his Eighth Amendment claim if he proved "wanton infliction", but not if he proved only "inadvertent failure".

The clause excerpted by petitioners cannot possibly be read in the inclusive disjunctive. The court expressly stated that its three phrasings of the issue were functionally equivalent. Obviously, an "inadvertent failure" is not the functional equivalent of a "deliberate indifference" (clause 1) or a "conscious disregard" (clause 3). Moreover, to read the second clause in the inclusive disjunctive is to charge the Seventh Circuit with being unable to read its own citation to this Court's opinion in Estelle v. Gamble.

Petitioners' contention that the Seventh Circuit's decision conflicts with Estelle v. Gamble is frivolous and provides no basis for granting certiorari.

III.

The Seventh Circuit Did Not Hold That A Trial Court May Not Exercise Discretion Under Fed.R. Civ. P.39(b); The Seventh Circuit Correctly Held That In This Case The Trial Court Abused Its Discretion In Denying A Jury Trial To Plaintiff.

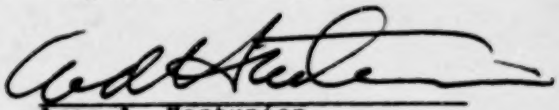
The final issue raised by petitioners is based on the false premise that the Seventh Circuit decided that a trial court has no discretion to deny a jury trial under Fed R.Civ.P.39(b). What the Seventh Circuit unanimously held was that the trial court abused its discretion in denying a jury trial to a blind, indigent prisoner who was proceeding pro se, who had filed a jury demand only nine days late, who had requested the appointment of counsel within the time for making a jury demand, and who had informed the trial court that he felt incompetent to litigate his own claim.

This issue does not warrant the granting of certiorari since the actual holding of the Seventh Circuit was correct, since there are no conflicts among the circuits on this issue, and since the decision of the Seventh Circuit turns upon the unique facts of this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted



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Billy Merritt,

Respondent.

RESPONDENT'S MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent Billy Merritt, by his attorney, moves, pursuant to United States Sup. Ct. Rule 46, for leave to proceed in forma pauperis before this Court for the reasons stated in the attached affidavits.

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AFFIDAVIT OF BILLY MERRITT
IN SUPPORT OF
MOTION FOR LEAVE TO
PROCEED IN FORMA PAUPERIS

STATE OF INDIANA)
LaPorte) SS
COUNTY OF ~~PORTER~~)

I, Billy Merritt, after being duly put upon my oath, depose and state as follows:

1. I am the respondent in the above-captioned proceeding ("the proceeding").

2. This affidavit is made in support of my Motion for Leave To Proceed in forma pauperis in the proceeding.

3. I am presently imprisoned in the Indiana State Prison at Michigan City, Indiana.

4. Because of poverty, I am unable to pay the fees, costs and printing expenses of the proceeding or to give security therefor. I am not employed and have no savings nor

valuable property.

5. Leave was sought and granted for me to proceed in forma pauperis in related proceedings before the United States Court of Appeals for the Seventh Circuit and before the United States District Court for the Northern District of Indiana.

6. In the action filed in the United States District Court for the Northern District of Indiana, I sought redress for defendants' deliberate indifference to my serious medical problems. A judgment in the defendants' favor was reversed by the United States Court of Appeals for the Seventh Circuit for the reasons that the district court abused its discretion in refusing to appoint counsel for me and in refusing to grant a jury trial.

7. I believe that I am entitled to the redress which I originally sought in the United States District Court for the Northern District of Indiana, and I believe that the arguments raised by petitioners' certiorari petition are without merit.

FURTHER DEPONENT SAYETH NOT.

State of Indiana
County of LaPorte

Billy Merritt
Billy Merritt

SUBSCRIBED and sworn to
before me this 18th
day of Oct, 1983.

William D. Hudak
Notary Public St. Joseph County, Ind.
My commission expires

_____